No. 21401

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

G. RICARDO SALAS,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF GUAM

BRIEF FOR THE APPELLEE

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I N D E X

CITATIONS

Cases:

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JURISDICTIONAL STATEMENT

This action was brought by appellant, as a citizen, resident and taxpayer of the Territory of Guam, on behalf of himself and all other citizens, residents and taxpayers of Guam, for the purpose of asserting an alleged contractual claim possessed by the Government of Guam against the United States which that Government, it is alleged, has taken no action to enforce. (R. 1-4). The district court dismissed the complaint. (R
The jurisdiction of the district court was invoked under the Tucker Act, 28 U.S.C. 1346(a)(2), and under Section 22(a) of the Organic Act of Guam, 48 U.S.C. 1424(a). This Court has jurisdiction of the appeal under 28 U.S.C. 1291.

STATEMENT OF THE CASE

Appellant brought this suit in his capacity as a citizen, elector, resident, and taxpayer of the Territory of Guam, on behalf of himself and all other citizens, electors, residents, and taxpayers of Guam. (R. 2). Appellant alleges that, since the passage of the Organic Act of Guam on August 1, 1950, the Government of Guam has spent in excess of $10 million for transportation and housing of officers and employees of the Government of Guam whose homes when hired were off the island. This suit, filed on June 9, 1966, seeks recovery of this sum from the United States for the benefit of the Government of Guam. It is alleged that the Government of Guam has taken no action to recover the expense and that a demand upon it to take such action would be useless. (R. 3). Appellant also seeks an award of attorneys' fees from the fund to be created by the action. Ibid.

Appellant alleges that the Government of Guam is entitled to recover its expenditures for transportation and housing of its employees on the basis of Section 26(c) of the Organic Act of Guam, 48 U.S.C. 1421d(c). That Section provides that "officers and employees of the government of Guam shall, if their homes be outside Guam, be entitled to transportation at the expense of the United States * * * from their homes to Guam upon their appointment and from Guam to their homes upon completion of their duties * * * [and] shall each be entitled to receive appropriate quarters to be furnished by the United States at

established rentals." Since fiscal 1953, Congress has not appropriated funds to meet these expenses.[1/]

The district court dismissed the complaint on the ground that it lacked jurisdiction under the Tucker Act. This appeal followed.

STATUTES INVOLVED

The Tucker Act, 28 U.S.C. 1346(a), provides in relevant part as follows:

> The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> * * * * *
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

Section 26(c) of the Organic Act of Guam, 48 U.S.C. 1421d(c), provides in relevant part as follows:

> All officers and employees of the government of Guam shall, if their homes be outside Guam, be entitled to transportation at the expense of the United States for themselves, their immediate families, and their household effects, from their homes to Guam upon their appointment and from Guam to their homes upon completion of their duties: Provided, That such transportation other than that incident to initial appointment shall not be required to be furnished

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1/ The Department of the Interior has taken the position that Congress is obligated under the Organic Act to appropriate these funds (R. 31). However, contrary to appellant's assertion (brief, p. 6), this does not constitute an admission that, in face of Congress' refusal to appropriate the funds, the United States is liable in this action.

unless they shall have served in Guam for at least two years, unless separated for reasons beyond their control. * * * During their term of duty in Guam they shall each be entitled to receive appropriate quarters to be furnished by the United States at established rentals.

ARGUMENT

I. THE DISTRICT COURT HAD NO JURISDICTION IN THIS ACTION TO ADJUDICATE A CLAIM OF THE GOVERNMENT OF GUAM

This action is based on a claim of the Government of Guam. That Government -- not appellant -- has paid transportation and housing expenses of its employees, and that Government -- not appellant -- is allegedly entitled to reimbursement from the United States. Any recovery in this action would be paid to the Government of Guam, not to appellant. We shall now demonstrate (1) that appellant's status as a citizen and taxpayer of Guam does not entitle him to act as a private attorney general in bringing a civil action on behalf of the Government of Guam, and (2) that in any event, appellant cannot obtain an adjudication with respect to a claim of the Government of Guam in an action t which that Government is not a party.

1. Appellant is not authorized to bring a suit on behalf of the Government of Guam.

The Organic Act of Guam vests the executive authority of the Government of Guam in the Governor of Guam, who is given "general supervision and control of all executive agencies and instrumentalities of the government of Guam." 48 U.S.C. 1422. The Government Code of Guam creates a Department of Law which is

administered by the Attorney General of Guam and has "cognizance of all legal matters in which the government of Guam is in anywise interested." Government Code, Sections 7000, 7001.[2/] Accordingly, the Governor of Guam, acting through the Attorney General, has exclusive authority to bring civil suits on behalf of the Government of Guam. This authority is not vested in appellant.

It is well established that the Attorney General of the United States has absolute discretion to refuse to bring litigation on behalf of the Federal Government, or to dismiss such litigation once brought, despite the objections of private persons whose interests are affected. Confiscation Cases, 7 Wall. (74 U.S.) 454; Parker v. Kennedy, 212 F. Supp. 594 (S.D.N.Y.). The Attorney General of Guam has similar authority with respect to claims belonging to the Government of Guam.

2/ These Sections provide:

> § 7000. Attorney General. The Department of Law of the government of Guam shall be administered by the Attorney General of Guam, who shall be appointed by the Governor of Guam, with the advice and consent of the Legislature, and shall be subject to removal by the Governor.
>
> § 7001. Department of Law, cognizance. The Department of Law shall have cognizance of all legal matters in which the government of Guam is in anywise interested. It shall have cognizance of all matters pertaining to public prosecution. For this purpose the Island Attorney, deputy Island Attorneys and all employees of the Island Attorney's office shall form the prosecution division of the Department of Law and are placed under the jurisdiction of the Attorney General.

Appellant's suit is not sustainable on the authority of cases permitting municipal taxpayers to sue on behalf of the municipality where the municipality has refused to bring suit, or the cases permitting stockholders to sue on behalf of the corporation where the directors have refused to sue. In the first place, appellant is confronted here with statutes vesting the executive authority of the Government of Guam in the Governo with authority to act in legal matters vested in the Attorney General. Moreover, even if the statutes are disregarded, the authorities regarding municipalities and corporations do not support appellant's position. In the case of stockholders' derivative suits, the stockholder must either show that the directors' refusal to sue results from self-dealing (as in the typical case where the suit is against directors or officers), or that their refusal to sue is fraudulent for some other reason Solomont & Sons Trust v. New England Theatres Operating Corp., 326 Mass. 99, 93 N.E. 2d 241 (1950);[3] Brooks v. Brooks Pontiac, Inc., 143 Mont. 256, 389 P. 2d 185 (1964).[4] A similar rule

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3/ "Intelligent and honest men differ upon questions of busines policy. It is not always best to insist upon all one's rights; and a corporation * * * may properly refuse to bring a suit which one of its stockholders believes should be prosecuted." 326 Mass. at 112, 93 N.E. 2d at 248.

4/ "The mere fact that a corporation has a cause of action for an injury does not always make it incumbent upon it to sue, any more than in the case of an individual. If, in the opinion of the directors or a majority of the stockholders, the best intere of the company do not require it to sue, it need not do so. The matter ordinarily is within their discretion, and if they act in good faith, their refusal to sue violates no right of dissenting stockholders, so as to entitle them to maintain a suit in their own behalf. The exercise of such discretion by the directors will not be lightly set aside by the court, and where a stockhol complains of such action of the directors the court will conside the circumstances, and, if no bad faith is shown, will decline t substitute the judgment of the stockholder for that of the managing directors." 143 Mont. at 260, 389 P. 2d at 187.

prevails in states where a taxpayer is allowed to sue on behalf of a municipality: the suit is allowed only where self-dealing is involved, or the refusal by the municipality to sue is otherwise fraudulent. Tucker v. Edwards, 214 La. 560, 38 So. 2d 241, 243 (1948).

Appellant's complaint in this case alleges neither self-dealing nor fraud, but merely asserts that the Government of Guam has a cause of action which it has failed to prosecute. In effect, appellant asserts that a government must bring a lawsuit whenever it has a cause of action, and if it does not, a taxpayer may bring suit on its behalf. We know of no authority to support this proposition.

There are several reasons why the Government of Guam might reasonably conclude that this suit should not be brought. It might well have thought that Congress' continued failure to appropriate funds to pay for transportation and housing expenses of Guam Government employees was deliberate[5/] and as a consequence effected a pro tanto repeal of the statute creating the obligation. Cf. United States v. Dickerson, 310 U.S. 554; Sutton v. United States, 256 U.S. 575. Moreover, in the face of a deliberate refusal to appropriate funds, the Government of Guam might have

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5/ The annual appropriations for the Department of the Interior since 1953 have included funds for other obligations of the United States under the Organic Act of Guam, but not for transportation and housing of employees. 66 Stat. 457; 67 Stat. 273; 68 Stat. 372; 69 Stat. 149; 70 Stat. 264; 71 Stat. 265; 72 Stat. 163; 73 Stat. 100; 74 Stat. 112; 75 Stat. 250; 76 Stat. 339; 77 Stat. 102; 78 Stat. 278; 79 Stat. 179.

thought that to press the claim -- even if it were valid -- would jeopardize other congressional appropriations for the benefit of Guam.[6/] Indeed, the legislative history of Sections 3 and 31 of the Organic Act, 48 U.S.C. 1421h and 1421i -- which provide that the federal income tax is applicable in Guam and that the proceeds are payable to the Treasury of Guam -- shows that Congress intended that, as Guam became self-supporting, it would no longer need appropriations from the Federal Treasury. 96 Cong. Rec. 7577 (May 23, 1950, Reps. Peterson, Miller and Scrivner).[7/] And finally, the Government of Guam may have

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6/ Appellant introduced in the district court a letter from an Assistant Secretary of the Interior regarding funds for transportation and housing of off-island employees. The letter states (R. 31): "The first civilian Governor of Guam, Mr. Carlton Skinner, has testified that he did not seek such funds from the Congress because, in his judgment, such action might have jeopardized Guam's retaining other more valuable fiscal benefits also conveyed by the Organic Act."

7/ In 1950, when the Organic Act was passed, Guam was not self-supporting, and deficits in its budget had to be met by funds from the federal treasury. S. Rep. No. 2109, 81st Cong., 2d Sess., at 6. It was believed, however, that Guam would become self-supporting within two years. Id., at 15. General appropriations for support of the local government were made in 1951 and 1952, 64 Stat. 694, 65 Stat. 262, and the United States in those years paid the expenses of transportation and housing for off-island employees of the Guam Government. (R. 31) In subsequent years, these appropriations were not made. See appropriation acts cited in note 5, supra. In 1966, the House Committee on Interior and Insular Affairs, in reporting favorably a bill to provide for popular election of the Governor of Guam, stated: "Except in such emergency cases as the one caused by Typhoon Karen in November 1962, virtually all of the expenses of the government of Guam are borne locally and the expenditure of Guam's tax revenues is fully under local control." H.R. Rep. No. 1520, 89th Cong., 2d Sess., at 4.

concluded that it, rather than the United States, has the primary obligation to pay for transportation and housing of its own off-island employees, and that the United States is merely in the position of surety if the Government of Guam fails to meet its primary obligation to its own employees. This conclusion would be supported by the language of the statute, which confers a right in officers and employees of the Government of Guam to be reimbursed by the United States for housing and transportation expenses, but does not state that the Government of Guam may recover from the United States if it assumes these expenses. Indeed, in 1964, the Legislature of Guam recognized the primary obligation of the Government of Guam to provide for transportation expenses of its off-island employees. Government Code, Section 4110.[8/]

We are, of course, not privy to the internal deliberations of the Government of Guam. But that Government has sued the United States in the past. Government of Guam v. Federal Maritime Commission and United States, 329 F. 2d 251 (C.A.D.C.). There is no reason to believe that it would not do so again if it believed that a suit was in the best interests of Guam.

8/ This Section provides in relevant part:

> Off-island employees: transportation. Whenever it is necessary to recruit officers or employees from outside Guam, the Governor may provide for transportation of such officer or employee, his dependents, and his household and personal effects, to Guam, and upon completion or termination of his employment, from Guam to his point of recruitment.
> * * *

2. The district court could not adjudicate a claim of the Government of Guam in an action to which that Government is not a party.

Even if appellant were entitled to bring this suit, he could not do so unless he made the Government of Guam a party. Just as a corporation is an indispensable party in a stockholder's derivative suit based on a corporate claim against a third party, Moore, 3 Federal Practice, pp. 2379-81, so too is the Government of Guam an indispensable party in an action based on a claim belonging to it. This case involves substantial questions not only as to the basic question of liability under Section 26(c) of the Organic Act, but also as to the amount that would be owing if liability were established -- the Department of the Interior believes the amount would be approximately $5 million (R. 31, 32, 46, 47), while appellant claims over $10 million. It would be a violation of due process to bind the Government of Guam on these questions by any judgment in this case, and yet if the Government of Guam were not bound, the United States could be sued again on the same claim.

II. THIS ACTION INVOLVES A SINGLE CLAIM FOR OVER $10 MILLION AND IS THUS BEYOND THE JURISDICTION OF THE DISTRICT COURT UNDER THE TUCKER ACT.

Appellant relies primarily on the Tucker Act, 28 U.S.C. 1346(a)(2), to establish jurisdiction in the district court to hear this suit against the United States. However, the Tucker Act limits the jurisdiction of district courts in contract cases against the United States to claims "not exceeding $10,000 in amount * * *." 28 U.S.C. 1346(a)(2). Since the present suit

involves a claim for over $10 million,[9/] it does not fall within the jurisdiction of the district court under the Tucker Act.

Appellant attempts to avoid the problem by characterizing his suit as a class action, consisting of separate claims by each citizen, elector, resident and taxpayer of Guam. (R. 2). It is alleged that each separate claim "does not exceed approximately $200 in amount." Ibid. Reliance is placed on United States v. Louisville & Nashville Railroad Co., 221 F. 2d 698 (C.A. 6), where it was held that 74 claims for freight shipments, each claim amounting to less than $10,000, were within the jurisdiction of the district court under the Tucker Act and could be joined in a single suit, despite the fact that the total amount of the claims was well over $10,000. However, in that case, unlike here, the claims could have been brought in separate suits: the consolidation in a single suit was merely for purposes of convenience and did not affect the jurisdiction of the court. As the court pointed out, the complaint sought recovery "on 74 separate and distinct claims for freight alleged to be due on separate and independent shipments, each separate claim being for an amount less than $10,000 and hence within the jurisdictional limitation of the Tucker Act. * * * The decisive fact is that each claim is founded upon a different contract." 221 F. 2d 698.

9/ A large part of the $10 million claim is clearly barred by the Tucker Act six-year limitation period, 28 U.S.C. 2401, 2501: appellant seeks recovery for expenditures beginning in 1951 (R. 2, 50), while this action was brought in June, 1966. (R. 1). However, over $5 million of the claim was spent since 1960. (R. 50).

By contrast, in the present case each citizen, elector, resident, and taxpayer of Guam does not have a separate claim on which a separate suit could be brought. As the district cou pointed out, "It is complete and utter fiction to regard this claim as a compilation of fifty thousand separate claims accrui to each citizen of Guam. Assuming it has merit, the claim is owed to the Territory of Guam." (R. 38). Since this is a sing claim, it "cannot be divided into separate suits for the purpos of evading the jurisdictional requirements of the Tucker Act." Sutcliffe Storage & Warehouse Co. v. United States, 68 F. Supp. 446, 447 (D. Mass.), aff'd 162 F. 2d 849 (C.A. 1). "The congressional policy is that all large claims must be presented in the one court in Washington, and in every practical sense there is here presented such a large claim." 162 F. 2d at 852.[10/]

Appellant also bases jurisdiction on Section 22(a) of the Organic Act of Guam, as amended, 48 U.S.C. 1424(a), which provides in relevant part:

> The District Court of Guam shall have the jurisdiction of a district court of the United States in all causes arising under the Constitution, treaties, and laws of the United States, regardless of the sum or value of the matter in controversy, [and] shall have original jurisdiction in all other causes in Guam, jurisdiction over which has not been transferred by the legislature to other court or courts established by it * * *.

10/ Nor could appellant have brought his case within the $10,000 limitation by alleging that each expenditure by the Government of Guam for employee transportation and housing expenses gave rise to a separate claim, since this, too, would split the single cause of action. Sutcliffe Storage & Warehouse Co. v. United States, 162 F. 2d 849 (C.A. 1).

While this language extends the jurisdiction of the District Court of Guam beyond that of other federal district courts, the legislative history makes it clear that the statute was intended merely to give the District Court of Guam jurisdiction over certain local cases which federal courts in the states would not have.[11/] In short, this statute was concerned with allocation of jurisdiction over local cases as between the District Court of Guam and the local Guamanian courts. It was not intended to give the District Court of Guam jurisdiction over federal cases that would otherwise lie exclusively in the Court of Claims, or to expand the waiver of sovereign immunity set forth in the Tucker Act.[12/]

11/ The District Court of Guam is not an Article III court. It was created under Article IV, Section 3 of the Constitution, giving Congress power to regulate the territories. S. Rep. 2109, 81st Cong., 2d Sess., at 12.

12/ The judiciary sections of the Organic Act of Guam were drafted in consultation with Judge Albert B. Maris of the Third Circuit Court of Appeals. S. Rep. 2109, 81st Cong., 2d Sess., at 6. In a letter reprinted in the House Committee report, Judge Maris makes the following comment (Ibid., at 12):

> It happens that the Virgin Islands are in our circuit and that I have had occasion to observe the business which comes before the district court there. The fact is that the Federal business coming into the court is comparatively small, the bulk of the court's business involving local cases and the whole amount of business, both Federal and local, not providing an excessive workload for one judge.
>
> I would assume that the situation in Guam would be roughly analogous to that in the Virgin Islands and that the case load, both Federal and local, would not likely be much greater. If that is so the creation of a district court to consider Federal cases alone would be quite unjustified and it would be much more appropriate to confer upon the district court jurisdiction over local cases generally or over such local cases as are not assigned by the Guam Legislature to some other court created by it.

(Footnote cont'd)

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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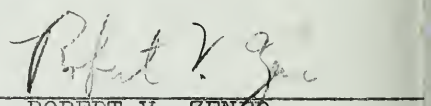
CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



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12/ (Footnote cont'd)
The language of Section 22(a) conferring jurisdiction "regardless of the sum or value of the matter in controversy" was added by amendment in 1958. 72 Stat. 178. Both the House Committee report, and a letter from Judge Maris appended to the report, explain that the purpose of this language was to waive the jurisdictional amount required for federal question cases by 28 U.S.C. 1331. H.R. Rep. 951, 85th Cong., 1st Sess., at 1, 7.

AFFIDAVIT OF SERVICE

DISTRICT OF COLUMBIA)
) ss.
CITY OF WASHINGTON)

ROBERT V. ZENER, being duly sworn, deposes and says:

That on July 5, 1967, he caused three copies of the foregoing brief for appellee to be served by air mail, postage prepaid, upon counsel for appellant:

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Subscribed and Sworn to before me this 5th day of July, 1967.

[Seal]

NOTARY PUBLIC

My Commission expires April 14, 1972.